

**CalRecycle Responses to 15-day Comments, Proposed Regulation on Architectural Paint Recovery Program**  
**Sorted by Regulation Section Number**

*Note: Comments submitted during the 15-day public comment period (October 10, 2011 – October 25, 2011) that are not shown in this matrix were considered by CalRecycle staff and either determined not pertinent to the modifications which were the subject of the 15-day comment period or were considered already adequately addressed in the [45-day response to comments](#). Some comments not directly related to the 15-day modifications were, however, determined by CalRecycle staff to warrant additional response and so were included in this 15-day response to comments matrix.*

**MFR/SO = Manufacturer or Stewardship Organization**

Section/ Area	Comment Number	Commenter Affiliation	First name	Last name	Summary of Comment	CalRecycle Response	Revisions Needed
<b>General Comment #1</b>	--	--	--	--	CalRecycle received numerous comments asserting that the department lacks the authority to include requirements not expressly contained in AB 1343.	CalRecycle maintains it has been given authority by the legislature to make regulations whenever there is substantial evidence that regulations are needed to implement, interpret, make specific, or to govern CalRecycle’s procedure when there is ambiguity regarding any requirement under the program, to effectuate the purpose of the statute. Therefore, this rulemaking seeks to add clarity and establish the necessary administrative procedures to fulfill CalRecycle’s responsibilities under AB 1343.	--
<b>General Comment #2</b>	--	--	--	--	CalRecycle received numerous comments asserting that the language in the proposed regulation should duplicate the language in statute.	Cal. Gov. Code § 11349 et. seq. discourages the indiscriminate incorporation of statutory language in a regulation. The department has elected only to repeat statutory definitions in the regulation where it believes repetition is reasonably necessary to promote clarity.	--
<b>General Comment #3</b>	--	--	--	--	CalRecycle received numerous comments asserting that reporting requirements for program activities go beyond what is allowed in statute.	CalRecycle asserts that it has authority to require information on all program activities paid for by the architectural paint stewardship assessment as part of its duties under statute. PRC §48703(b)(4) tasks the department with approving the assessment and ensuring that it is sufficient to recover, but not exceed, the cost of the architectural paint stewardship program and that any surplus funds are put back into the program to reduce the costs of the program, including the assessment amount.	--
§18951(f)	W27-01	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	<p>The definition of “operational costs” in subsection (f) is inconsistent with statute and lacks clarity. The distinction is on the basis of who incurs the expense, CalRecycle on one hand, or a paint manufacturer or a stewardship organization on the other. The definition “operational costs” fails to make this distinction and leaves open an interpretation of the regulation that “operational costs” could include expenses incurred by CalRecycle. As such, it lacks clarity.</p> <p>Recommendation:</p> <p>“‘Operational Costs’ means costs necessary to cover the cost of implementing a manufacturer or stewardship organization’s paint stewardship program, including, but not limited to collection, transportation, processing, disposal, and education and outreach operations.”</p>	<p>In response to comment W02-01 following the 45-day comment period, CalRecycle staff stated:</p> <p>The intent of offering a definition of “operational costs” in the proposed regulation is to identify the kinds of costs that may be incurred during the operation of a program as outlined in a stewardship plan. These costs may be borne by many different stakeholders, and would be the subject of negotiation between the parties, therefore CalRecycle does not concur with restricting costs to those incurred directly by a manufacturer or stewardship organization.</p> <p>Upon further review, CalRecycle staff determined that clarifying operational costs as those of a MFR/SO would not, in fact, negate the operational or other costs borne by other stakeholders, and by revising the definition would clarify that these are a MFR/SO’s operational costs in carrying out their stewardship program. Any costs borne by other stakeholders, such as prospective service providers, would need to be negotiated with the MFR/SO.</p>	§18951(f)
§18951(h)	W27-02	American	Gene	Livingston	The definition of “service provider” serves no legitimate purpose because	The purpose of defining “service providers” is to identify and acknowledge those entities that	None

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		Coatings Assoc. (ACA) & PaintCare			the term is used in sections of the regulation that are inconsistent with the statute. The definition of “service provider” should be struck from the regulations.	<p>may participate in a paint stewardship program, and which therefore helps to clarify how those service providers will be compensated (e.g., through mutually agreeable and reasonably feasible agreements established between the MFR/SO and the service provider, as negotiated.)</p> <p>CalRecycle staff does not concur that the sections of the regulation in which the term “service provider” is used, or any other section of the proposed regulation, are inconsistent with statute. Therefore, no changes are recommended based on this comment.</p>	
§18952(b) (2)	W27-03	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	CalRecycle has no authority to approve, let alone, disapprove or conditionally approve a plan based on its own findings. A plan that meets the requirements set forth in section 48703 must be approved.	PRC §48704(a) grants CalRecycle the authority to approve or disapprove a stewardship plan. Regulations are put in place to clarify statute. In this way, CalRecycle establishes fair, consistent criteria for making the determination. The conditional approval provision is consistent with other programs where CalRecycle has similar responsibilities implementing statute. The department recognizes that there may be instances where it is in the best interest of stakeholders such as a MFR/SO, consumers, and local jurisdictions to proceed with implementation of a program while certain portions of a plan are being brought into compliance with statute.	None
§18952(b) (3)	W27-04	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	Nothing in statute authorizes resubmission of a plan. The structure of the statute is that information subsequent to the plan is provided to CalRecycle in annual reports.	<p>PRC §48704(c) states that a manufacturer or stewardship is to implement a plan as approved.</p> <p>Once a plan is approved, the only reason that a plan would need to be re-submitted would be if there is a “significant or material change”. To maintain consistency with PRC §48703(b)(4), which states that the architectural paint stewardship assessment shall be approved by the department as part of the plan, CalRecycle has defined “significant or material change” to be any modification to the assessment previously approved.</p> <p>CalRecycle maintains that any “significant or material change” to a previously approved plan merits another review and approval process as part of the department’s role as the oversight and enforcement authority for the architectural paint recovery program.</p>	None
§18952(c) (3)	W27-05	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	CalRecycle has exceeded its authority under the statute by giving itself the ability to adopt a finding of compliance or non-compliance for an annual report and requiring resubmission of an annual report and/or supplemental information upon a finding of non-compliance. A finding of compliance or non-compliance must be made pursuant to section 48705 and not based on CalRecycle findings.	PRC §48705(a) and (b) grants CalRecycle the authority to adopt a finding of compliance or non-compliance based on a complete reporting of its architectural paint recovery efforts. In the case that the department adopts a finding of non-compliance, a process for a MFR/SO to obtain compliance with this chapter must be described so that the requirements are applied consistently to all MFRs/SOs, thereby ensuring a level playing field for all MFRs/SOs. The alternative to this process would be that, instead of having time to resubmit a plan that presumably would be found in compliance, the MFR/SO would be subject to immediate penalties, and, if found to be intentional, knowing, or negligent, would be penalized up to \$10,000 per day of non-compliance.	None
§18953(a) (3)	W27-06	American Coatings	Gene	Livingston	CalRecycle has gone well beyond the statute in dictating what must be set out in the stewardship plan ostensibly as part of the goals. While the	CalRecycle staff does not concur. As previously stated in response to a similar 45-day comment by the commenter:	None

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		Assoc. (ACA) & PaintCare			statute requires goals, the regulation requires a description of how the goals were derived.	<p>CalRecycle knows, based on experience with other programs, that a thorough and transparent description of goals and how they are derived and measured contributes to a successful program.</p> <p>Revisions were made to offer suggestions in this regard while still providing a minimum description of the goals that a MFR/SO establishes pursuant to PRC §48703 (d), so that CalRecycle and other stakeholders have a basic understanding of those goals.</p>	
§18953(a) (5)	W27-07	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	The regulations provide that a manufacturer or stewardship organization that does not participate in market development is not subject to penalties “for this section.” The clear implication of that statement is that a paint manufacturer or stewardship organization that fails to participate, that is, fails to include in the stewardship plan other provisions of regulatory section 18953, is subject to penalties. If that is CalRecycle’s intent, it has no such authority.	<p>CalRecycle staff added this provision based on comments and recommendations provided by ACA during the 45-day public comment period.</p> <p>ACA acknowledged in its comment letter dated September 5, 2011, that certain provisions are mandatory. Therefore, these other mandatory provisions could be subject to penalties, and the department asserts that it has such authority.</p> <p>See also response to General Comment #3.</p>	None
§18953(a) (5)	W35-01	Californians Against Waste	Mark	Murray	<p>According to Public Resources Code (PRC) 40180, "Recycle" or "recycling" means the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and <b>returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products</b> which meet the quality standards necessary to be used in the marketplace. "Recycling" does not include transformation, as defined in Section 40201.</p> <p>CalRecycle is correct in requiring market development in the regulations because market development is, by definition, part of recycling. Recycling is a required element in the goals as stated in PRC 48703(d).</p>	No response is needed since no revision was suggested to the provision regarding market development information.	None
§18953(a) (6)(D)	W33-01	Los Angeles Co. Solid Waste Mgmt Cmte/Integr ated Waste Mgmt Task Force	Margaret	Clark	<p>Consistent with CalRecycle’s EPR Framework, an effective stewardship program must be designed to <i>provide financial relief to local governments and require minimal local government involvement</i>.</p> <p>As seen through the comments submitted by local jurisdictions, there is an overwhelming concern that the Regulations allow a loophole that would place local jurisdictions at a disadvantage during contract negotiations with manufactures or a stewardship organization. Language in the Regulations state that operational costs may be covered through manufacturers or a stewardship organization who will attempt to negotiate to establish a “mutually agreeable and reasonably feasible agreement” to address those costs. This language of “mutually agreeable</p>	<p>This comment is similar to comments submitted during the 45-day period. CalRecycle maintains the position it expressed earlier.</p> <p>See also responses to comments W14-10 and W14-02.</p>	None

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					<p>and reasonably feasible agreement” used throughout the Regulations, in reality, allows manufacturers or a stewardship organization not to fully address the cost burden of local jurisdictions.</p> <p>Suggested Revision:  Revise Section 18953 6(D) and other applicable sections to reflect the cost issue. If a local jurisdiction chooses to participate in the program, its operation costs including administration at minimum must be covered. For that reason, we would also like Section 18951 (f) to be revised as follows: “Operation costs” means costs to operate a paint stewardship program, including but not limited to, <b>administration</b>, collection, transportation, processing, disposal, and education and outreach costs.</p>		
§18953(a) (7)	W27-08	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	The implication of this provision is that a paint manufacturer or stewardship organization could be penalized for advertising a collection point that is not a service provider.	This provision may be subject to a penalty. It is CalRecycle’s intention to ensure that, consistent with provisions elsewhere in the regulation, mutually agreeable and reasonably feasible agreements are utilized in order for a stakeholder such as a local jurisdiction and its infrastructure to be utilized as part of a MFR/SO’s program.	None
§18953(a) (10)	W27-09	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	CalRecycle sets out an optional provision and states that a manufacturer or stewardship organization that fails to report on “non-financial activities” is not subject to penalties for this section. Again, the implication is that failing to include every other criteria mandated by these regulations in a plan is subject to penalties.	This comment is not valid because §18953(a)(10)(B) was previously stricken from the proposed regulation.	None
§18954(a) (2)	W35-02	Californians Against Waste	Mark	Murray	<p>CalRecycle is correct in including paint containers in the stewardship program - the statute is clear on this issue that the funding mechanism is to provide a stewardship assessment on each container, not just the paint in the container. Manufacturers cannot sell paint without the container so it is logical that they cannot take back paint without taking back the containers as well.</p> <p>PRC 48703 (a)(2) The funding mechanism shall provide for an architectural paint stewardship assessment <b>for each container of architectural paint sold</b> by manufacturers in this state and the assessment shall be remitted to the stewardship organization, if applicable.</p>	No response is needed since no revision was suggested to the provision regarding paint containers.	None
§18954(a) (9)	W27-10	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	The statute, section 48705(a)(6), requires an independent financial audit. Subsection (a)(9) dictates how the audit is to be conducted, who is to conduct it, and most egregiously of all, provides that CalRecycle may investigate further to review the findings of the auditors, and to request further information. The Legislature was satisfied with an independent audit, relying on that sole safeguard to provide it with the assurance it	The independent financial audit will present an opinion of the organization’s financial reporting. This information will not provide an analysis on the compliance of the organization with the requirements of the program. Additionally, audits often have findings that require corrective action. The oversight of these corrective actions resides with the department. The audit becomes an important component of the oversight of the program but may lead to	None

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					needed that the paint industry is operating consistently with its intent. Nothing in the statute suggests that the Legislature intended to set up CalRecycle as an auditor of the auditor, to review materials other than the audit report.	compliance or other questions that the department reserves the right to pursue.  See also response to General Comment #3.	
§18955.1 Table I.	W27-11	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	CalRecycle’s enforcement mechanism is through approving the first plan and determining compliance thereafter through the annual reports. Therefore, the failure to submit a stewardship plan or one containing all of the elements required by Public Resources Code section 48703, results in those manufacturers being prohibited from selling paint and retailers from selling paint produced by those manufacturers. That is the enforcement mechanism, not the imposition of civil penalties. Civil penalties are to be imposed for selling paint produced by manufacturers not in compliance. The same analysis is applicable to the failure to pay the administrative fee, the failure to submit an annual report, and the failure to include in the annual report the elements required by PRC section 18705(a).  Recommendation: Strike from Table I all of the violations except the first, offering or selling paint produced by a manufacturer not in compliance with this chapter, as provided in PRC 18702(b).	PRC §48703(d) and (f), states that CalRecycle has the authority to enforce the entire chapter, and sets penalty amounts in statute. Therefore, CalRecycle staff do not concur with the commenter that the only enforcement mechanism for a MFR/SO or retailer is through the sales ban alone.	None
§18955.1 Table II	W27-12	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	Same analysis as for Table I, above.  Recommendation: Strike from Table II the second violation.	PRC §48704(d) and (f) state that the department shall enforce this chapter and that a civil penalty may be administratively imposed by the department on any person who violates this chapter in an amount of up to one thousand dollars (\$1,000) per violation per day.  Therefore, CalRecycle staff do not concur with the commenter that the only enforcement mechanism for a MFR/SO or retailer is through the sales ban alone.	None
§18956	W27-13	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	CalRecycle has no authority to require recordkeeping beyond the materials provided to it in the stewardship plan and annual reports. It has no authority to require that the manufacturers and retailers make records available at any time, and certainly not immediately, or to impose penalties for failure to provide records.  Recommendation: Strike all of section 18956.	PRC §48703(d) and (f) states that CalRecycle has the authority to enforce the entire chapter, and sets penalty amounts in statute. It is implicit in enforcement that the manufacturer or stewardship organization substantiates the activities in the annual report, and that requires certain documentation. These records would already be required under other state laws.  The authority to audit carries with it the reasonable access to records necessary for the conduct of the audit. Federal OMB Circular A-122, Attachment A, General Principles, A Basic Considerations, 2 Factors affecting the allowability of costs..., states reasonable costs “G. Be adequately documented.”  The “immediate” provision was removed for the 15-day comment period version of the proposed regulation in response to the comment submitted by ACA during the 45-day comment period.	None

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						<p>Also see response to comment <a href="#">W02-42</a>.</p> <p>Also see response to General Comment #3.</p>	
§18957	W27-14	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	<p>Regulatory sections 14 CCR sections 17044 and 17045 require a person submitting data claimed to be a trade secret or confidential or proprietary information to indicate that at the time of submission. The PRC section 48704(b) makes clear that financial, production, or sales data is not a public record. Comparing the PRC provision with the existing regulation raises the question of whether a manufacturer or stewardship organization submitting a stewardship plan containing financial, production, or sales data is obligated to identify that data as proprietary and confidential at the time of submission. Moreover, 14 CCR, section 17046, setting out the procedure that CalRecycle follows in determining whether information is to be disclosed or not, also raises the question of whether this is the process to be followed if a request is made by a member of the public for financial, production, or sales data included in a stewardship plan?</p> <p>Recommendation: CalRecycle needs to clarify how its existing regulation applies to a request for financial, production, or sales data included in a stewardship plan, if the existing regulation is to apply at all.</p>	<p>The provisions in Title 14 of the California Code of Regulations, Division 7, Chapter 1, Article 4 (commencing with Section 17041) were adopted by the Division to implement the requirements in the California Public Records Act in Chapter 3.5 of Division 7 of Title 1 of the Government Code. In fact, the first line of the Regulations cited in Section 17041 specifies that “This article shall apply to all requests to the Board pursuant to the California Public Records Act (<a href="#">Government Code sections 6250 et seq.</a> ) for the disclosure of public records or for maintaining the confidentiality of data received by the Board.”</p> <p>California Code of Regulations, Division 7, Chapter 1, Article 4, with or without this provision, applies to all Public Records Act requests made to the Department. The reference in this regulation is made to places stakeholders on notice regarding Department practices and guidelines regarding protected information; this section is not intended to conflict with, expand or decrease the privacy rights extended to a manufacturer or stewardship organization.</p>	None
§18958	W27-15	American Coatings Assoc. (ACA) & PaintCare	Gene	Livingston	<p>CalRecycle may not delegate to itself the authority to set an administrative fee without complying with the APA. This regulation, to the extent it contemplates the imposition of a fee without future compliance with the APA, lacks clarity. Moreover, necessity must be demonstrated in the rulemaking record, not just for a fee, but for the specific fee. The absence of a specific fee in this regulation raises a clarity issue, and as a consequence, nothing in the rulemaking record sets out the facts supporting the need for a specific fee amount. A specific fee imposed by CalRecycle, without complying with the APA, would be invalid as an underground regulation. CalRecycle should either strike all of section 18958, or propose a specific fee. If it proposes a specific fee, it needs to demonstrate the need for the specific amount in the record of the rulemaking proceeding.</p>	<p>PRC §48704(e)(2) requires the department to impose fees in an amount that is sufficient to cover the department’s full costs of administering and enforcing this chapter, including any program development costs or regulatory costs incurred by the department prior to the submittal of the stewardship plans.</p> <p>CalRecycle is unable to provide a final invoice for these costs at this time, but has generated some cost estimates based on projected staff time needed for this program. Staff estimates the administrative fee for the period covering November 2010-June 30, 2012, to be \$200,000. The fee for the first fiscal year of the program (2012-2013) is estimated at \$400,000, and the fee for the next fiscal year (2013-2014), and all subsequent years is estimated at \$375,000 per year, assuming the program is implemented smoothly.</p> <p>Oregon’s annual architectural paint recovery program costs were stated as \$3.3 million in the annual report submitted by PaintCare, covering a population roughly one-tenth the size of California’s. After scaling these costs for California’s larger population, staff estimates that the ongoing annual administrative fee will represent approximately 1.1% of the architectural paint recovery program’s total costs.</p>	None